BRIEF 55 NON MEASURING BRIEF

Case No. 23-01109

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

On Petition for Review from the Federal Energy Regulatory Commission in Consolidated Case No. 23-01109

Brief of Petitioner, HOLY ORDER OF MOTHER EARTH

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STATEMENT OF ISSUES PRESENTED

I. Under Section 7(e) of the NGA, was FERC's finding of public convenience and necessity for the AFP arbitrary and capricious when FERC found a "project need" for a company lacking a free trade agreement with the United States that plans to export 90% domestic gas production to Brazil, and when FERC relied only on precedent agreements to grant the CPCN to Transnational Gas Pipeline?

II. Under the NEPA's requirements for environmental impact statements, is FERC's conclusion arbitrary and capricious when it decided that the adverse environmental harms do not outweigh the public benefits resulting from the proposed pipeline?

III. Given the infringement on HOME's religious practices, does FERC's decision to route the pipeline through HOME's property violate the Religious Freedom Restoration Act?

IV. Under Section 7(e) of the NGA, does FERC have the authority to impose GHG conditions to mitigate reasonably foreseeable indirect effects of the construction of the AFP?

V. Under NEPA review, is FERC's action to not impose any GHG conditions addressing downstream and upstream GHG emissions arbitrary and capricious when FERC has authority to mitigate and 90% of the natural gas being transported is for export?

STATEMENT OF THE CASE

I. Statement of Facts

This case is about Federal Energy Regulatory Commission's, (FERC or the Commission), missteps to approve Transnational Gas Pipelines, LLC (Transnational Gas) for construction of a natural gas pipeline, the American Freedom Pipeline (AFP), which will transport natural gas for export. R. 5. Extending for ninety-nine miles across states lines from Old Union to New Union, this pipeline will slice through property belonging to the Holy Order of Mother Earth (HOME or Holy Order) effectively disrupting their religious ceremonies and perpetuating carbon pollution. R. 10, 11, 15.

A. Infringement of HOME's religious tenets and impacts to the land

HOME worships the sanctity of the natural world and believes that nature itself should be worshiped and respected. R. 11. Recognizing the damaging effects of industrialization on the environment, HOME believes that humanity should do everything in its power to protect the environment- especially over economic interests. *Id.* For HOME's members, their property itself is devoted to the preservation of the Earth. R. 12.

HOME proactively proposed an alternative pipeline route through the Misty Top Mountain range to prevent destruction of the land. R. 5, 10. TGP argued against this alternative route, contending that it would cost an additional $51 million and cause "more objective" environmental harm. R. 11. However, the current route will not only harm the environment on HOME's property, but burden a vital religious pilgrimage. R. 10, 13. The construction will destroy approximately 2,200 trees and other plant species on the property, R. 10, which will never be replanted, leaving the land with a "bare spot." R. 13.

Moreover, the AFP interrupts the pathway which HOME's members use for their Solstice Sojourn. R. 11. For over eighty years, this significant ceremonial journey recurs during the summer

and winter solstices and includes a coming-of-age ritual for the children in Holy Order. *Id.* The worshipers journey bidirectionally from a temple on the west side of the property to a sacred hill on the east. *Id.* With the construction of the new pipeline, HOME's members will pilgrimage across that fossil fuel perpetuator every six months from hereon. R. 11.

B. The AFP will transport natural gas to be exported.

Though Transnational Gas has agreements with two American energy companies, most of the Liquefied Natural Gas (LNG) transported through the AFP will not be retained for domestic use. R. 6. The new pipeline will not carry any additional amounts of natural gas, but instead take 35% of production from the Hayes Fracking Field (HFF) that Transnational Gas's old pipeline, the Southway Pipeline, currently transports. *Id*. The AFP will reroute that LNG to the NorthWay Pipeline, which is connected to M&R Station in New Union City. *Id.* International Oil & Gas Corporation (International Oil) owns that station. R. 5.

There are no plans to increase natural gas production at the HFF, but Transnational Gas asserts that the re-routing of natural gas through the AFP will serve a market need. R. 6. It claims the re-routing will not cause gas shortages, because the diminishing populations of Old Union provide no reason to supply more natural gas to the domestic regions. *Id.* Instead, 90% of the natural gas transported by the AFP will be sold to International Oil, which will export it to its parent company in Brazil. R. 8. The remaining 10% of the AFP will be sold to the New Union Gas and Energy Services Company, hereinafter New Union Gas, for the local communities' use. R. 4.

C. Mitigating Greenhouse House Gas (Carbon) Pollution

To mitigate the burning of fossil fuels from the construction of AFP and the fossil fuel's effect on the environment surrounding HOME's land, FERC imposed greenhouse gas (GHG) conditions on Transnational Gas's project in the Certificate of Public Convenience and Necessity

(CPCN). R. 11, 14. This order laid out four conditions for the pipeline construction, all of which Transnational Gas contends FERC has no jurisdiction to enforce. R. 14.

Adherence to these GHG conditions means less CO2e emissions, or carbon pollution, produced per year of construction. R. 15. Over the four-year construction period, adherence would result in saving a total of 63,040 CO2e emissions. *Id*. However, if Transnational Gas does not adhere to the conditions, CO2e emissions would be four times as high at 252,160. *Id*. However, HOME contends that these conditions only mitigate the carbon pollution from the construction of the pipeline but no upstream or downstream pollutions. *Id*.

II. Procedural History

On April 1, 2023, FERC issued a CPCN to Transnational Gas for construction of the AFP. R. 2. After the CPCN was released, HOME and Transnational Gas each filed a timely request for a rehearing by FERC regarding separate issues with the Commission's decisions. *Id.* HOME petitioned FERC to review their decisions on the following: (1) that Transnational Gas has demonstrated a public need for the AFP despite the fact that approximately 90% of the gas carried by the pipeline will undisputedly be exported to Brazil; (2) that the routing of APF across HOME's land does not violate the Religious Freedom Restoration Act (RFRA), and (3) that the downstream and upstream GHG emissions should not be included in the GHG conditions imposed on Transnational Gas. R. 4, 5.

On May 19, 2023, FERC denied both parties' petitions for rehearing and affirmed the original CPCN. R. 1. On June 1, 2023, HOME and Transnational Gas separately filed timely petitions to this Court to review FERC's denial for rehearing of the order. R. 2.

STATEMENT OF JURISDICTION

According to 15 U.S.C.§ 717r(b), parties aggrieved by an order issued by the FERC may obtain review in the court of appeals for any circuit where the natural gas company is located or has its principal place of business or in the United States Court of Appeals for the District of Columbia. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir 2015). It must be filed within sixty days of the issuance after the order of the Commission upon applying for rehearing. *Id*.

SUMMARY OF THE ARGUMENT

This Court should grant HOME's petition for review because the Commission erred in the following ways. First, FERC's decision to grant Transnational Gas a Certificate for Public Convenience and Necessity was arbitrary and capricious, because 90% of the gas to be transported by the AFP will be exported to Brazil and will not serve a domestic purpose. Moreover, FERC unreasonably relied on Transnational Gas's precedent agreements with International Oil and New Union Gas by overlooking evidence of self-dealing. This Court is less likely to consider precedent agreements with affiliated shippers, because Transnational Gas's relations with International Oil's Brazilian parent company as well as Transnational Gas being organized under the laws of New Union strongly favor evidence of self-dealing.

Next, FERC's decision that the public benefits of the pipeline construction outweigh the adverse impacts was arbitrary and capricious because the Commission failed to appropriately evaluate the substantial removal of trees and vegetation under the rules of the National Environmental Policy Act, hereinafter NEPA. Its reasoning regarding the environmental impact falls short of what scientific and legal research proves to be reasonable in assessing the negative impacts of pipeline construction on the environment. By rejecting HOME's alternative route,

FERC assumes Transnational Gas's contentions about environmental impacts rather than demonstrating its own thorough scientific analysis for public scrutiny, as required by the NEPA.

Further, FERC failed to carefully consider the adverse impact on HOME's religion. After HOME raised a claim under the Religious Freedom Restoration Act, FERC did not apply the appropriate strict scrutiny. The proposed pipeline will heavily burden HOME's fundamental tenet to protect Mother Earth and disrupt the sanctity of its religious ceremonies. It will also cause the destruction of sacred land on which HOME's members practice their religion. FERC, in turn, argues on a slippery slope against religious exemptions, which the Supreme Court affirmed is the very reason that the Act's protections exist. Thus, the Commission fails to meet its own burdens in proving that the compelling government interest overcomes the substantial burdens placed on HOME.

Next, FERC's determination to not include conditions mitigating the upstream and downstream effects of GHG emissions of the AFP project is arbitrary and capricious. Through the Natural Gas Act (NGA), Congress granted FERC the authority to approve any application for interstate pipelines. The D.C. Circuit has established that because pipelines could cause major environmental damage, FERC has a legal authority to set terms and conditions when granting the application for a pipeline to mitigate reasonably foreseeable effects including GHG emissions caused by the construction of the pipeline. Unlike the EPA's action that triggered the Major Questions Doctrine, FERC's decision to impose GHG conditions relates to its approval authority of natural gas pipelines under the NGA. Finally, FERC's decision to not include mitigation measures for the upstream and downstream effects of GHG emissions was arbitrary and capricious because FERC could reasonably foresee that the natural gas will be burned and cause carbon pollution.

STANDARD OF REVIEW

This Court reviews the Commission's orders, including those approving certificate applications, under the familiar arbitrary and capricious standard. *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014). Review under the standard is narrow and courts are instructed to provide deference to FERC's decisions in granting or denying CPCNs. *See* 15 U.S.C. § 717d.

ARGUMENT

HOME's claims arise out of concern for detrimental environmental impacts of carbon pollution. This is a religious group that wants to preserve its natural property and protect its religious practices without unnecessary governmental interference. The Federal Energy Regulatory Commission (FERC), as a government authority charged with approving these pipelines, must not only balance the environment but also the concerns of the public. Thus, pipelines should not be designed for the benefit of one citizen and to the determinant of another.

When a pipeline invades a community and does not demonstrate any domestic public benefits, it heaps a burden onto the people that only does more harm than good. By constructing pipelines through miles of unique habitats for corporate interests, FERC disrespects the sacred nature of the Earth, which HOME strives to protect as part of its religious tenets. Moreover, this Court understands the necessity of assessing the impacts of greenhouse gas emissions. Therefore, this Court should find that FERC's decisions were arbitrary and capricious, and grant rehearing for HOME's petition.

I. FERC erred in granting the CPCN to Transnational Gas because the AFP does not demonstrate a project need or outweigh any adverse effects.

FERC incorrectly granted the Certificate of Public Convenience and Necessity (CPCN) to Transnational Gas for the construction of the AFP. Under the NGA, the Commission regulates

interstate natural gas transportation and sale and issues certificates for natural gas facilities when a project need is demonstrated. 15 U.S.C. § 717f(c), (e). A CPCN must be obtained from the Commission before the construction or extension of natural gas transportation facilities. *Id*. § 717f(c)(1)(A). Section 7(e) requires FERC to grant a certificate to construct a new pipeline where the pipeline "is or will be required by the present or future public convenience and necessity." *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

In granting this certificate, it is emphatic that no "project need" serves the business interest of pipeline developers and ignores actual domestic demands. Allowing pipeline developers to ignore domestic demands would perpetuate a lack of consideration for domestic customers which would go against the Congressional intent behind the NGA and CPCNs. *See* 15 U.S.C. § 717. Important purposes taken into consideration when issuing certificates include conservation, the environment, and antitrust restrictions. *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976). Nonetheless, Congress enacted the NGA to encourage the development of ample natural gas supplies at reasonable prices. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301,1307 (citing *NAACP,* 425 U.S. at 669-70). However, the purpose of this Act is undermined in this case as ample "natural gas supplies" at reasonable prices are only relevant to ten percent of domestic citizens but ninety percent for export to Brazil.

This Court should find that FERC erred in issuing Transnational Gas a CPCN for the following reasons: (1) Transnational Gas has not demonstrated a project need because 90% of the LNG will be exported to Brazil and (2) FERC unreasonably relied upon Transnational Gas's precedent agreements with affiliated shippers to serve their own self-interest. Therefore, FERC's reasoning that "precedent agreements for gas that is to be exported are a valid consideration in

determining the need for a project," *see* R. 9, should not have weighed heavily when they granted Transnational Gas a CPCN because the AFP does not serve domestic needs.

II. FERC's decision was arbitrary and capricious because it lacked a rational basis between the facts and its explanation to grant the CPCN to Transnational Gas.

FERC's project need finding in the CPCN was unjustified and unsupported because 90% of the gas transported by the AFP will be for export. This Court reviews the Commission's orders, including those approving certificate applications, under the arbitrary and capricious standard. In such a review, a Court overrules FERC's order when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004). An agency's action may be arbitrary when it relies on factors Congress may not want it to consider, fails to consider an important part of the problem, offers an explanation that runs against evidence, or is implausible such that it could not be ascribed to a difference in view. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

To meet the standard, FERC provides a reasonable explanation of its action, and courts look for a "rational connection between the facts found and choice made." *See Motor Vehicle,* 463 U.S. at 43. Because a "grant or denial of a certificate for public necessity and convenience is peculiarly within the discretion of the Commission," *Oklahoma Nat. Gas Co. v. Fed. Power Comm'n*., 257 F.2d 634, 639 (D.C. Cir. 1958), this Court cannot "substitute its judgment" for the Commission's." *Minisink*, 762 F.3d at 106. If this court upholds FERC's arbitrary decisions, pipeline companies could get away with serving their own profitable "business" interest instead of a domestic one.

The "project need" for the pipeline has not been demonstrated as a domestic need because 90% of the gas transported by the pipeline is for export to Brazil. When determining whether an LNG pipeline serves a public purpose, FERC evaluates whether the public benefits of the pipeline

outweigh potential adverse effects prior to the issuance of a CPCN. *Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128 (2000).

Public benefits that FERC considers include, but are not limited to, meeting unserved demand, lowering consumer costs, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, and promoting clean air. *See id.* Additionally, "potential adverse effects" that the Commission considers are those that (1) effect existing customers of the applicant, (2) the interests of existing pipelines and their captive customers, and (3) the interests of landowners and the surrounding community, including environmental impacts." *Id.* Despite Congress's stated interest in importing and exporting natural gas between nations with free trade agreements, exports alone cannot sufficiently demonstrate the "project need" for the AFP pipeline in the United States. *See* 15 U.S.C. § 717b(c); *City of Oberlin v. FERC*, 39 F. 4th 719, 721 (D.C. Cir. 2022); R. 8. Natural gas pipelines must serve a domestic purpose despite Congress's stated interest in importing and exporting natural gas between nations with free trade agreements. *See* 15 U.S.C. § 717b(c); *City of Oberlin,* 39 F. 4th at 721.

However, exports alone cannot sufficiently demonstrate the "project need" for the AFP pipeline in the United States. *See* R. 8. In *City of Oberlin v. FERC,* the city sought rehearing, contending that FERC's approval of the Nexus pipeline route from Ohio to Michigan was arbitrary and capricious. *City of Oberlin,* 39 F. 4th at 725. The city argued that using the pipeline for gas exports should not influence the determination of public convenience and necessity under Section 7. *Id.* at 724. On remand, FERC found that the Nexus Project's domestic benefits included contributing to economic growth and supporting jobs in gas production, transportation, and distribution. *See City of Oberlin,* 39 F. 4th at 727; *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199 (2020). FERC provided three reasons supporting these domestic benefits: (1) Congress

favors export agreements with free trade nations, (2) domestic benefits prevail regardless of gas distribution location, and (3) the eight export agreements, constituting 59% of the pipeline's capacity, demonstrated the need for additional capacity to serve domestic interests. *City of Oberlin*, 39 F.4th at 725. Likewise, in *Driftwood Pipeline LLC,* FERC found that the pipeline demonstrated a project need on the basis that there was demand growth in the Lake Charles region, so and the current pipelines in the region did not have the capacity to meet the expected growth, alleviating capacity restraints. *Driftwood Pipeline LLC*, 183 FERC ¶ 61,425 (2023).

Here, the AFP does not substantially serve any domestic purposes. Unlike many of the cases presented, 90% of the gas in this case is being exported out of the country, benefiting a foreign nation instead of domestic customers. Notably, in *City of Oberlin* and *Driftwood* the pipelines were constructed for domestic purposes such as serving multiple shippers in the contract, reducing gas production, and creating jobs. However, the AFP does not alleviate any restraints on the Southway Pipeline since the population growth and demand in the area has declined. R. 6. In fact, the multiple domestic needs it serves, R. 8, are already being served by the Southway Pipeline. R. 9. Thus, Transnational Gas's plan to re-route 35% of the production at Hayes Fracking Field (HFF) through the AFP rather than the Southway Pipeline is unreasonable. R. 6.

Further, FERC's order recognized that the natural gas produced in the HFF is already fully transmitted by the existing Southway Pipeline. R. 9. However, FERC made a clear error of judgment by looking over this fact to emphasize Transnational Gas's binding contract with International Oil. Unlike *City of Oberlin*, AFP will export 90% of gas to foreign customers compared to only 17% in *City of Oberlin.* Transnational Gas did not establish that the AFP will serve domestic needs because the Southway Pipeline already does, and 90% of the natural gas is

to be transported via the AFP for export to Brazil. As such, FERC incorrectly concluded that Transnational Gas has sufficiently established a domestic need.

Moreover, FERC's reluctance to give weight to Brazil's absence of a free trade agreement with the United States undermines Congress's mission of favoring export agreements with foreign nations under the NGA. There is a stark difference between FERC's determination of domestic "project need," while serving export industries in other cases than FERC's limited reasoning in our case. *See City of Oberlin*, 39 F.4th at 725; *Driftwood,* 183 FERC ¶ 61,425 (finding demonstrated need based on precedent trade agreements with countries United States have free trade agreement with and capacity constraints being alleviated domestically). In *City of Oberlin*, although the Nexus Project only accounted for 17% of the pipeline's capacity serving Canadian customers, Canada has a free trade agreement with the United States. *City of Oberlin*, 39 F.4th at 723. Additionally, in *Driftwood*, FERC reasoned that the free trade agreement present between the United States and another country would further the reliability supply for an export facility and benefit other shippers. *Driftwood*, 183 FERC ¶ 61,425.

It does not go without notice that Transnational Gas's "project need" substantially fails because unlike Canada in *City of Oberlin,* Brazil lacks a tree trade agreement with the United States, eradicating a pivotal requirement recognized by Section 7. Although the Commission did not find the lack of a tree trade agreement between Brazil and the United States to be meaningful, R. 9, it is a requirement that the Commission should have considered. Unlike *Oberlin* where Nexus entered into eight precedent agreements, with six out of eight being domestic companies, Transnational Gas has only two precedent agreements, with one out of two predominantly serving Brazil. This further demonstrates the lack of domestic benefits the AFP will contribute. FERC has given little recognition to the lack of free trade agreement present between Brazil and the United

States, R. 9, therefore the export of natural gas should not weigh heavily in determining Transnational Gas's certificate for public convenience and necessity.

In closing, 90% of the gas transported via the AFP is for export to Brazil and does not contribute any domestic need, and because no free trade agreement exists between Brazil and United States, FERC erred in determining Transnational Gas's project need was met.

III. FERC unreasonably relied upon Transnational Gas's precedent agreement with International Oil and New Union Gas.

The precedent agreements that Transnational Gas has with International Oil and New Union Gas should have limited, probative value in FERC's decision of a project need existing for the AFP. In the past, FERC relied on a finding of project need mostly based on binding agreements/contracts, *see Twp. of Bordentown v. FERC,* 903 F.3d 234 (3rd Cir. 2018) (reiterating that FERC need not look beyond applicant's contracts with shippers for CPCN). However, the realities of the natural gas industry have changed to increase the probative value of the adverse impacts pipelines can impose. *See* 178 FERC ¶ 61,679; *Delaware Riverkeeper Network v. FERC* 45 F.4th 104, 115 (D.C. Cir. 2022) (recognizing that Commission relied "almost exclusively on precedent agreements to establish project need" in past, but Commission looks to other evidence of project need now).

A. FERC has not explained why it relied on Transnational Gas's precedent agreements when the CPCN advises looking beyond such agreements.

Despite the historic importance of precedent agreements in proving demand for a project, the Commission will no longer require an applicant to present contracts for project demand. 178 FERC ¶ 61,679. As a matter of course, if an applicant has entered into contracts or precedent agreements for the capacity . . . they would count as important evidence of demand for the project. *Id.*

Now, appellate courts are not inclined to rely solely on precedent agreements to be the end-all for deciphering if FERC correctly issued a CPCN. In *Allegheny Defense Project v. FERC*, the D.C. Circuit held that the Commission's findings of market-need requirement were satisfied on review of the construction of the disputed pipeline relying in part on "precedent agreements." *Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020). The appellate court found that the Commission also grounded its finding of market need on "comments by two shippers and one end-user, as well as a study submitted by one of the Environmental Associations, all of which reinforced the [domestic] demand for the natural gas shipments." *Id.*

In *City of Oberlin*, petitioners sought review on the basis that transporting gas for export to Canada was not evidence of need for a pipeline. *City of Oberlin*, 39 F.4th at 721 The court did not hesitate to note that FERC must consider all factors bearing on the public's interest. *Id.* at 722. FERC first argued that exports to free trade nations like Canada are beneficial because Section 3 of the NGA states that such exports are "per se consistent with the public interest." *Id*. On remand, however, FERC admitted that it would have granted the certificate without considering the export agreements. *Id.* at 722. The court concluded that FERC had not explained why considering these agreements was lawful and remanded without vacatur for FERC to justify its decision. *Id.*

Under these circumstances, FERC's reliance upon the agreements between Transnational Gas, International Oil, and New Union, was over extensive and excessive. R. 6. Notably, in the modern gas world, the commission has updated its policy to consider a broader range of adverse effects bearing on the public's interest, R. 7, when deciding whether a gas company should be issued a CPCN. However, FERC disregards this administrative policy by overlooking the adverse effects that the AFP will have on HOME. Although these precedent agreements may serve an important purpose to FERC's decision, having 90% of the LNG for export to serve Brazil's interest,

compared to 10% of the gas possibly serving domestic citizen's interest, R. 8, is no measly fact to be overlooked. Unlike *Allegheny* where the appellate court respected the updated policy on issuing CPCNs and considered the precedent agreements the company had only in part, FERC hardly considered anything outside of Transnational Gas's precedent agreements, R. 8-9, letting those agreements be the "end-all" in their decision-making. FERC also did not consider environmental studies nor comments from shippers or end-users to inform FERC's final decision in finding the construction of the AFP to be a project need. R. 8.

Equally important, FERC did not find that 90% of exported LNG to Brazil, which does not have a free trade agreement with the United States, not serving a domestic need to be of any significance. R. 8. However, like in *City of Oberlin*, FERC has not explained why LNG predominantly being exported takes precedence over other important considerations that the Commission requires according to the CPCN process. R. 8-9. Therefore, any reliance upon the precedent agreements should have less weight when granting the CPCN.

B. The Commission ignored record evidence of self-dealing and failed to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement.

According to the Commission's own Certificate Policy Statement, it failed to conduct the interest-balancing required by it seriously and thoroughly. Likewise, the significance of whether precedent agreements are between affiliated or non-affiliated shippers is reduced by eliminating a specific contract requirement. *See Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (2022). Conversely, it does not go unnoticed that "a project with precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate." *Id.*

If there is an emphasis on using precedent agreements as reason for demonstrating project need, then this Court should find that agreements with entities that are affiliated with a certain project carry less weight than an agreement with a non-affiliated entity. In *EDF v. FERC*, the appellate court held that the Commission's finding of market need was arbitrary and capricious in part because "the application was supported by only a single precedent agreement" with a shipper who "was a corporate affiliate of the applicant who was proposing to build the new pipeline." *EDF v. FERC* 2 F.4th 953, 973 (D.C. Cir. 2021). The pipeline company, in this case, "privately entered into a precedent agreement with one of its corporate affiliates for just 87.5 percent of the pipeline's projected capacity." *Id.* The court reasoned that because the agreement was reached after the pipeline builder held an open season that produced no precedent agreements, and because petitioners had found plausible evidence of self-dealing between the entities, the precedent agreement with an affiliated shipper was questionable. *Id.* at 973-75.

By contrast, in *Delaware Riverkeeper Network v. FERC***,** Adelphia, a pipeline builder, held an open season that produced precedent agreements with four different shippers for the large majority of the pipeline's capacity. *Delaware Riverkeeper,* 45 F.4th at 114. "And crucially, most of the Project consists of an existing pipeline that is merely changing ownership; in that context, the Commission could reasonably conclude that precedent agreements were especially good evidence of demand for the pipeline's capacity." *Id.* at 114.

In this case, Transnational Gas is developing the pipeline for profitable business interest which is shown through Transnational Gas and New Union Gas's corporate affiliation. Transnational Gas is a limited liability company organized under the laws of the State of New Union. R. 5. Therefore, like the pipeline company in *EDF*, the relationship between Transnational Gas and New Union Gas unequivocally evidences self-dealing. Unlike in *Delaware Riverkeeper*,

most of the project in this case does not consist of an existing pipeline. Thus, this Court is less likely to determine that agreements between affiliated groups carry less weight than affiliated ones, and the relationships between Transnational Gas, a New Union organization, and International Oil, a Brazilian company, strongly favor evidence of self-dealing.

Therefore, this Court should find that FERC's decision to grant Transnational Gas a Certificate for Public Convenience and Necessity to be arbitrary and capricious because 90% of the gas was for export to Brazil. Additionally, the AFP will not serve a domestic purpose by rerouting gas already being domestically provided by the Southway Pipeline. Moreover, FERC unreasonably relied on Transnational Gas's precedent agreements with International Oil and Transunion by overlooking evidence of self-dealing.

IV. FERC's finding that the benefits from the AFP outweighed the adverse environmental harms was arbitrary and capricious.

FERC's balance of benefits and harms was arbitrary and capricious because the removal of vast amounts of trees and vegetative species is not an insignificant impact. The Commission can only approve a project when the public benefits of the proposed pipeline outweigh the project's adverse impacts. *Minisink*, 762 F.3d 97 at 101-02. Here, it incorrectly weighed in favor of proposed public benefit against the adverse environmental impacts in its CPCN.

When balancing public benefit and adverse impacts, FERC should weigh how the proposed pipeline affects the following: the environment, *see id.,* the market value on properties, *see id.* at 104, consumer costs for LNG demand, *see id.* at 102, effects on vulnerable populations in a community, *see Sierra Club v. FERC*, 867 F.3d 1357, 1370 (D.C. Cir. 2017), and/or religion and culture, *see Narragansett Indian Tribal Historic Pres. Office v. FERC*, 949 F.3d 8, 11 (D.C. Cir. 2020) (arising from tribe's attempt to save seventy-three ceremonial stone landscapes of cultural and religious importance in pipeline's approved path). The NEPA specifically requires agencies

such as FERC to use the environmental impact statement (EIS) to examine potential environmental harms. *See Sierra Club,* 867 F.3d at 1367. FERC may examine potential harms such as those that negatively impact geology, vegetation, wildlife, cultural resources, environmental justice, land use, and more. *See* FERC, GUIDANCE MANUAL FOR ENVIRONMENTAL REPORT INFORMATION 1-1 (2017).

When evaluating for the CPCN, FERC must take a "hard look" or demonstrate reasoned decision-making in discussing potential environmental impacts, including proposed alternatives to the original route, in its EIS. *Sierra Club,* 867 F.3d at 1367. This process is done under the NEPA's rule of reason, which implements scientific and other expert agency analysis and then requires disclosure of the Commission's discussions on these environmental impacts for public scrutiny. *See WildEarth Guardians v. Provencio,* 923 F.3d 655, 688 (9th Cir 2019) (citing 40 C.F.R. § 1500.1(b)). However, NEPA directs agencies to account for potential environmental concerns; it does not force FERC to take further action for specific end results. *See id.* Courts typically afford FERC's decisions great deference, *Minisink*, 762 F.3d at 105-06, but in this case, this Court should find that FERC committed an error in its EIS per the NEPA analysis.

A. FERC erred in concluding that the removal of over 2,000 trees on HOME's land is an insignificant environmental impact.

HOME's petition for review takes issue with FERC's improper balancing of the environmental adverse impacts. The proposed route of the AFP requires eliminating over 2,200 trees and other vegetative species on HOME's property that will not be replaced. R. 10. Transnational Gas claims the removal is necessary for "safety concerns", but neither they nor FERC provide what those concerns entail. R. 10. This Court should conclude that the environmental value of those trees is significant and that FERC's balancing test was in error.

The cycle of dismissing environmental effects while the hydro-fracturing industry continues to grow is increasingly concerning from scientific and legal perspectives. *See* Kelsey

Eggert, *Speaking for the Trees: Preventing Forest Fragmentation in Pennsylvania's Marcellus Shale Region Through Pipeline Siting,* 17 VT. J. ENVTL. L. 372, 372-73 (2016). Infrastructure construction, especially for pipelines, typically involves tree clearing, which leads to the division of forests and ultimately, forest fragmentation. *See id.* at 373. The United States Geological Survey defines this event as "large areas of natural landscapes being intersected and subdivided by other, usually anthropogenic, land uses leaving smaller patches to serve as habitat for various species." *See id.* at 375-76. Forest fragmentation often results in the exposure of the core forest, home to more sensitive species of wildlife and vegetation, which creates heightened vulnerability for habitat loss, invasive plants, and loss of connectivity (for example, certain species will not cross a road, limiting movements of various species from small amphibians to larger mammals like black bears). *See id.* at 376-80.

Although FERC must meet NEPA requirements, the "hard look" doctrine only provides procedural protection. *See id.* at 382. With no call for subsequent action, courts are recognizing that the Commission needs to provide more reasoning for its environmental impact decisions. *See Recent Case: Vecinos para el Bienestar de la Comunidad Costera v. FERC,* 135 HARV. L. REV. 1148 (discussing overlooked issue after D.C. Circuit holds FERC must explain refusal to assess climate impacts). Rather than focusing on cost-efficiency and expediting construction to minimize disruption, FERC should have focused on the fact that the AFP will disrupt HOME's natural landscape. R. 10. The burial of the pipeline will leave a "bare [treeless] spot" forever. R. 13.

B. The rejection of HOME's alternative route demonstrates an error in FERC's environmental impact statement.

This Court should also find that FERC failed the "hard look" on the adverse environmental impact based on its evaluation of the proposed alternative route. The court in *Sierra Club v. FERC* found that inadequate discussions of the potential environmental impacts required FERC to

reassess its EIS. *Sierra Club,* 867 F.3d at 1363. It held that FERC failed to comply with NEPA requirements, because the EIS's deficiencies were so significant that FERC's final decisions based on that assessment undermined the requirements for public scrutiny and informed decision-making. *See id.* at 1368.

In this case, the alternative route illustrates that the Commission did not thoroughly consider environmental harm in its assessment. Transnational Gas's contentions were that the alternative "objective[ly]" causes more environmental harm due to its increased mileage "through more environmentally sensitive ecosystems in the mountains." R. 11. Commonly, tradeoffs occur between the production costs of gas pipelines and impacts on the environment. Kalin Kroetz et. al, *Tradeoffs Between Gas Pipeline Development Costs and Habitat Impacts. We Run the Numbers*, RESOURCES (May 29, 2019), https://www.resources.org/common-resources/tradeoffs-between-gas-pipeline-development-costs-and-habitat-impacts-we-run-numbers. Minimizing distance, however, does not automatically equate to environmental protection. *See id.* Pipeline placements that prioritize reducing the impacts on a habitat, by routing pipelines around forests for example, increases pipeline distances as well as costs. *See id.* When the cost increases for building a pipeline, construction is more likely to avoid disruption of vulnerable ecosystems. *See id*. FERC clearly adopted the argument that distance equals greater harm in the CPCN and whether it thoroughly investigated those environmental impact claims is unclear. The Commission reasserts that Transnational Gas "contends," but fails to provide its informed decision-making process for public scrutiny, as required under the NEPA. R. 11, 13. For FERC to seemingly adopt Transnational Gas's contentions raises an issue as to whether the Commission really took a "hard look."

It is evident that the Commission did not properly balance the public benefits of the project with the adverse impacts. Given the NEPA and the purpose of the EIS, FERC's conclusion that the

environmental impacts would be reduced to "less-than-significant levels" is incorrect, because FERC failed to provide scientific reasoning like forest fragmentation and clearly favored a cost-benefit analysis over the adverse impacts. Therefore, this Court should find that FERC's decision that the AFP provides greater benefit was arbitrary and capricious.

V. FERC's decision to route AFP over HOME's land violates RFRA, because it would substantially burden HOME's religion.

Chief Justice Burger once expressed that courts "are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Emp. Sec. Div*., 450 U.S. 707, 716 (1981). FERC did not find that the AFP would inflict harm on HOME's religion, and thus, violated its religious freedom under the Religious Freedom Restoration Act (RFRA). By failing to assess the religious burden under strict scrutiny, FERC erred in its decision to route the AFP through HOME's property and therefore, should grant HOME re-hearing on its RFRA claim.

Under RFRA, the government shall not substantially burden a person's exercise of religion even if the burden results from a general rule not facially aimed at religious practice. *See* 42 U.S.C. § 2000bb; *e.g. Thiry v. Carlson,* 78 F.3d 1491, 1494 (10th Cir. 1996). The claimant need only show that the government action substantially burdens a "sincere" exercise of religion. *See Thiry,* 78 F.3d at 1495. Once there is proof of a substantial burden on the claimant's religion, strict scrutiny is applicable, which requires a court to assess the issue based on the particular facts of that case. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

Under strict scrutiny, the government action is only constitutional if it satisfies its burdens under the compelling interest test: that the substantial burden placed on the religious party is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that governmental interest. *See id.* at 424 (quoting § 2000bb-1(b)). Thus, RFRA does not extend protections to claimants if the government action that burdens the religious practice does not

pressure or force a claimant to violate his religious beliefs. *See Ave Maria Found v. Sebelius*, 991 F. Supp. 2d 957, 964 (2014); *Navajo Nation v. United States Forest Serv*., 535 F.3d 1058, 1092 (9th Cir. 2008).

HOME provides sufficient evidence that FERC's action, by granting the AFP's construction, would substantially burden its sincere religious tenets and practices. Further, FERC fails to provide sufficient reasoning for a compelling government interest that is enacted through the least restrictive means.

A. AFP's location pressures HOME to compromise its own fundamental religious tenets and thus places substantial burdens on its religious practices.

The location of the AFP compromises HOME's fundamental religious tenets. It believes nature and the natural world to be sacred- that in their power, humans should promote the preservation of nature above all else. R. 11. Case law supports that religious tenets are acceptable in proving a substantial burden.

Petitioners, Roman Catholic nuns, in *Adorers of the Blood of Christ v. Transcontinental Gas Pipe Line*, argued that the existence of an active pipeline substantially burdened their exercise of religion, because their religious beliefs required that they protect the Earth from fossil fuels, which "defile God's creation". *See Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co.,* 53 F.4th 56, 58 (3rd Cir. 2022). The court only denied evaluating the RFRA claim, because the petitioners could and should have raised the claim during FERC's initial investigations, instead of four years too late. *See id.* at 66. According to the court, if the petitioners had appropriately raised the claim, they could have demonstrated a substantial burden on their religion and argued for the rerouting of the pipeline around their property as remedy. *See id.* at 61-65.

In contrast to the Adorers petitioners, HOME raised its concerns in a timely manner and that is not at issue. R. 3, 4, 10. The similarities, however, in both religious groups' reasoning for opposition to the pipeline demonstrates that HOME bears a substantial burden. HOME expressed feeling compelled, that the CPCN is like a physical gun to the head because it essentially forces them to support "the production, transportation, and burning of fossil fuels." R. 12. HOME's land would forcefully become a part of the process that transports LNG. *Id.* Therefore, HOME establishes that the location of the AFP bears a substantial burden, because its members feel pressured to violate their own religious beliefs.

Additionally, HOME offers further evidence regarding how the pipeline would burden its religious practices, particularly its Solstice Sojourn. Typically, when petitioners are still able to meaningfully practice their beliefs, they fail to demonstrate a substantial burden under RFRA. *Thiry*, 78 F.3d at 1494-96.

In *Thiry v. Carlson*, the court rejected a RFRA claim, because the petitioners' religious exercise admittedly was not substantially burdened. *Id.* at 1495-96. The petitioners claimed their own religious tenets, stemming from a combination of religions, made the land at issue, which held the gravesite of their stillborn daughter, religiously significant to them. *See id.* at 1494. However, those religious beliefs allowed the moving of gravesites when necessary. *See id.* at 1495-96. Despite feeling inconvenienced, the petitioners testified that their spirituality and practice of their religious beliefs could continue whether the gravesite was moved or not. *See id.* ("Thirys have in the past prayed, worshiped, and felt a closeness with God at places other than the area around the [gravesite area].").

In our case, Holy Order would not be left with the same capability to meaningfully practice its religion. The Solstice Sojourn is an important religious exercise, nearly 100 years old,

in which members journey across HOME's land. R. 11. Contrary to the petitioners in *Thiry*, the presence of the pipeline would "unimaginabl[y]" impair members of Holy Order, because they would be aware that they are walking over a pipeline every day. R. 12. For HOME, this undermines its beliefs, whether the pipeline is buried under or looming over their land. R. *Id*. Additionally, the AFP's construction will leave the land marred with a "bare spot," the destruction of 2,200 trees that will never be replanted. R. 13. The *Thiry* petitioners had no qualms with continuing to practice their religion; HOME argues that the meaning of its sacred ceremonies would be destroyed once the pipeline violates its land. Thus, there actually is an existence of physical impediments because HOME members would see the scar the pipeline has left on their property, which would substantially burden their religious beliefs.

B. Under RFRA, an argument against religious exemptions does not meet the burden of showing the least restrictive means to achieve a compelling government interest.

Transnational Gas argues that no substantial burden exists because no *physical* barrier exists, R. 13, but this argument is invalid under RFRA. While courts cannot always make religious exemptions, they are not permitted to assess whether a religious belief asserted under RFRA is reasonable. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 723-24 (2014) (holding government cannot question religious practices that find a certain end to be morally wrong).

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Supreme Court discussed that a government entity could not always rely on a slippery slope argument—the idea that if the government made one exception, more would follow. *Gonzales*, 546 U.S. at 435. The court ruled in favor of the religious organization, *see id*. at 439, and emphasized that RFRA calls for consideration, under the compelling interest test, of exceptions to "rules of general applicability," s*ee id.* at 436 (citing 42 U.S.C. § 2000bb-1(a)). The Supreme Court reaffirmed that religious exemptions are considered case-by-case. *See id.* The court reasoned that the government

party's argument dismissively scrutinized the religious party's asserted need and then hastily concluded that an exemption could not be accommodated. *See id.*

In this case, the contended lack of a physical barrier not only fails to weaken the fact that HOME's religion is substantially burdened, but it does not automatically indicate that FERC has a more compelling government interest. Electing to dismiss Holy Order's concerns that the AFP will be a barrier between its members' spirituality and the land on which they practice their religion is insufficient. The members would forfeit a space on which they can feel connected to their religious purpose, because the land on which they practice would be defiled by a mechanism for fossil fuel resources. R. 12. Their land would no longer be a sacred haven "fully devoted to Mother Earth" for members to securely feel connected to their nature deity. R. 11, 12. HOME cannot simply be treated "[as] every landowner in this subjective manner." R. 12. Like the government party in *Gonzales*, FERC has unjustly scrutinized that HOME's tenet to preserve the natural world is lesser than the construction of the AFP and should be sacrificed. Thus, FERC's argument slips down the slippery slope and compromises the religious freedom of HOME.

Holy Order's RFRA claim should be re-evaluated, given that it demonstrated a substantial burden to its religious tenets and practices. The Commission failed to meet its burden of a compelling government interest, and consequently erred in denying rehearing. Thus, this Court should remand the order that requires FERC to prove the compelling interest test.

VI. FERC has the authority to impose GHG conditions to mitigate carbon pollution resulting from the AFP's construction.

The Commission has the statutory authority to impose the specific requirements for mitigation of greenhouse gas (GHG) conditions because it may implement conditions according to its discretion. First, FERC is not limited in deciding whether to grant an application with conditions, because Congress broadly instructed the Commission to consider the public

convenience and necessity when evaluating construction applications for interstate gas pipelines. *Sierra Club*, 867 F.3d at 1373. Second, FERC has the legal authority to mitigate GHG's which are an indirect effect of authorizing a pipeline and are reasonably foreseeable. *Id*

A. The Commission has broad statutory to approve of the construction of AFP because it is an interstate pipeline.

FERC has the authority to impose conditions on any authorization to build interstate pipelines, and here, FERC determined that the mitigation of carbon pollution is required as part their conditional authorization to build the AFP. Congress authorized FERC to "regulat[e] the construction and operation of interstate gas pipelines" through the NGA of 1938. *Bordentown*, 903 F.3d at 243 (citing 15 U.S.C. §§ 717f, n). FERC must issue a CPCN to any company before construction of interstate pipelines can begin. 15 U.S.C. § 717f(c)(1)(A). Though the decision to grant or deny a certificate is within the Commission's discretion, *see Bordentown*, 903 F.3d at 262, FERC has the responsibility to attach "such reasonable terms and conditions as the public convenience and necessity may require." § 717f(e). In evaluating projects, FERC balances "the public benefits against the adverse effects of the project," and therefore, it can deny a certificate on the ground that it would be too harmful to the environment. *Sierra Club*, 867 F.3d at 1373 (quoting *Minisink*, 762 F.3d at 101-02) (holding direct and indirect environmental effects from pipelines are legally relevant causes). This balance includes an evaluation in compliance with the NEPA, which requires an assessment of the potential environmental impact of any proposed pipeline project. *Bordentown*, 903 F.3d at 243 (quoting *Delaware Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot.*, 870 F. 3d 171, 174 (3d Cir. 2017)).

In *Sierra Club*, the D.C. Circuit held that FERC had broad authority when considering the application of the Southeast Market Pipelines Project, which comprised of three pipelines running through Alabama, Georgia, and Florida. *Sierra Club*, 867 F.3d at 1363. (distinguishing from facts

where FERC had limited delegation, FERC acts with broad Congressional authority in approving interstate pipelines). Thus, the fact that FERC was evaluating an interstate pipeline construction allowed it to balance public benefits against adverse effects of the project and limit those effects. *Id.* at 1373.

Here, the AFP will extend ninety-nine miles from the state of Old Union into New Union, R. 5, not to fill a need in United States but rather only to export the natural gas to Brazil. Like the case in *Sierra Club*, FERC has broad authority from Congress to impose mitigating conditions that limit the adverse effects from constructing the AFP.

B. The GHG emissions from the construction of the AFP (pipeline) are reasonably foreseeable indirect effects.

The Commission imposed the GHG conditions due to the greenhouse gas emissions resulting from the construction of the AFP. When granting an application to build, not only does the Commission evaluate direct effects of a construction project, but also indirect environmental effects of the project. *Sierra Club*, 867 F.3d at 1371 (citing NEPA Review, 40 C.F.R. § 1502.16(b)).

"Indirect effects" are those that are a reasonably foreseeable cause of the project but manifest later. *Id.* at 1371 (citing NEPA Review, 40 C.F.R. § 1508.8(b)). Effects are reasonably foreseeable if there is a substantial likelihood "that a person of ordinary prudence would take [them] into account in reaching a decision." *Id.* at 1363 (citing *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016). Additionally, indirect effects are reasonably foreseeable where the Commission can identify the end users of the natural gas. *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023) (citing *Delaware Riverkeeper,* 45 F.4th at 110).

In *Sierra Club*, the D.C. Circuit found that FERC should have considered GHG emissions when it granted the application for an interstate pipeline in Florida that transported natural gas to Florida electric plants. *Sierra Club*, 867 F.3d at 1374. The D.C. Circuit held that the greenhouse-

gas emissions that will come from Florida electric plants should have been included in the Commission's analysis, because they were a reasonably foreseeable indirect effect of the pipeline. *Id.* at 1374. The Court stated that FERC did not need to know the exact quantity of greenhouse gases and that NEPA review usually involves some "reasonable forecasting." *Id.* Finally, the Court concluded that because the greenhouse gases were "an indirect effect of authorizing [the] project, which FERC could reasonably foresee, and which the agency [had] a legal authority to mitigate." *Id*.

Thus, in the facts here, FERC is not limited in setting conditional agreements to only the direct impact of the construction of AFP—such as replacing trees destroyed—but also reasonably foreseeable indirect effects such as GHG emissions stemming from the construction of the pipeline. R. 14. Like *Sierra Club*, where carbon pollution from burning gas was "reasonably foreseeable," the GHG emissions from the construction of the pipeline are reasonably foreseeable, indirect effects of its construction. FERC is not limiting GHG emissions based on the exportation of natural gas, but rather based on the construction of the interstate pipeline itself. R. 14.

In the CPCN, FERC imposed mitigations to limit carbon pollution resulting from the construction itself. *Id*. The CPCN required Transnational Gas to "mitigate the GHG emission impacts of the construction of the AFP (pipeline)." *Id*. For these reasons, the GHG emissions of the construction are a reasonably foreseeable indirect effect resulting from AFP's construction.

VII. The GHG conditions are not a major question, because FERC is managing the effects of the pipeline construction and not implementing broad policy decisions.

The Commission acted under broad authority from Congress when they issued conditions on the CPCN allowing the building of the AFP. The Supreme Court has recently invoked the major questions doctrine to reject agency action that claims to be regulatory authority when (1) the action, or claim of authority, surrounds an issue of "vast economic and political significance" and (2)

Congress does not clearly empower the agency with authority over the issue. *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014). Here, FERC is not implementing major changes or policy decisions by mitigating the GHG emissions of a singular pipeline project. Instead, they are acting within the authority granted by Congress to mitigate carbon pollution.

A. The GHG conditions imposed by the Commission are not of economic or political significance because it enacted them to regulate one project.

The decision of the Commission to add the GHG conditions is not extraordinary because the Commission is regulating GHG emissions directly from the construction of the pipeline, not all GHG emissions stemming from the use of natural gas. The major question doctrine applies only in 'extraordinary cases' when the "history and breadth" of the authority an agency asserts and the "economic and political significance" of the assertion provides "a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000)). That is, the question must have significant political and economic consequences for a whole industry. *Id*. Transnational Gas has claimed that FERC's imposition of GHG conditions is one of major question doctrine, but the GHG conditions are within FERC's statutory authority to impose.

Here, the Commission's imposition of GHG conditions is unremarkable. Since 1978, the NGA has required FERC to approve of the construction of interstate natural gas pipelines. 15 U.S.C. § 717f(e). The Commission will deny any application for interstate pipelines unless an applicant shows that the construction of the pipeline is or will be required by the public convenience or necessity. *Id.*

Because the NGA imposes a legal obligation on the Commission to allow the construction of pipelines, the Commission can mitigate reasonably foreseeable indirect and direct effects of pipeline building. Further, the Commission has limited greenhouse gas emissions since 2012. *See,*

e.g., Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions). FERC can deny a pipeline application on the grounds that it would be too harmful for the environment, so the agency is a legally relevant cause of the direct and indirect environmental effects of pipelines it approves. *Sierra Club,* 867 F.3d at 1363.

In *West Virginia v. EPA*, the Supreme Court ruled that the EPA's action was a major question because its authority was not within the Clean Air Act. *West Virginia*, 142 S. Ct. 2587 (2022). In 2015, the EPA enacted a new rule concluding that the best system for emission reduction would be to require that existing coal-fired power plants should either reduce their own production of electricity or subsidize increased generation by natural gas, wind, or solar sources. *Id.* at 2599. However, the Supreme Court held that this was outside the EPA's authority because it is "highly unlikely that Congress would leave to agency discretion the decision of how much coal-based generation there should be over the coming decades." *Id*. at 2612. Chief Justice Roberts summarily concluded that "no one would expect to find it is in the previously little-used backwater of Section 111(d)." *Id*. at 2613.

The Commission's imposition of GHG mitigation conditions is not unheralded power and does not invoke the major questions doctrine. Here, FERC has the legal obligation to permit the construction of interstate pipelines. This holds FERC legally liable when they approve of a pipeline. Unlike the case in *West Virginia*, where EPA imposed regulations of coal-producers across the entire United States, not a whole host of natural gas pipeline companies, so the FERC's power has not "transformed." Further unlike *West Virginia*, Section 717n is not a "backwater" of the

NGA, but rather a directive that Congress explicitly delegated to FERC in approving the construction of interstate pipelines.

Finally, these GHG conditions are only for the construction of the pipeline, and they do not propose to account for any further GHG effects of usage of the natural gas that the pipeline transports. R. 16. Construction of the pipeline will cause GHG emissions over four years is a mitigation of environmental harms that are reasonably foreseeable and therefore not an expansive growth of power implemented by the Commission. Finally, requiring applicants to mitigate GHG emissions is not a "new" action by the Commission, because they have enacted such conditions twice since 2012.

B. Even if the Major Question Doctrine applies, FERC has sufficient power under NGA to impose the GHG conditions.

Even if the major question doctrine applies to the GHG conditions, the Commission has sufficient authority under the NGA to impose such conditions. Under major questions doctrine, the agency must "point to clear congressional authorization for the authority it claims." *West Virginia*, 142 S. Ct at 2596 (quoting *Util. Air*, 573 U.S. at 324). Here, the NGA allows FERC to set specific terms and conditions when granting authorization, and that includes environmental mitigation measures. *Sierra Club*, 867 F.3d at 1373. Thus, FERC looks at both direct environmental harms and indirect harms are those that are later in time or farther removed in distance but are still reasonably foreseeable. *Id*.

Thus, because FERC conditioned the construction of an interstate pipeline, the Commission has broad Congressional authority to set terms and conditions when granting the application for a pipeline. Unlike the EPA's actions in *West Virginia*, the Commission's decision to impose GHG conditions relates to its authority to approve of natural gas pipelines which was

expressly granted to it by the NGA. For the following reasons, FERC is acting with broad discretion and authority granted by Congress in the NGA.

VIII. FERC's failure to mitigate downstream and upstream GHG emissions was arbitrary and capricious because it was within its authorization to do so.

FERC's failure to mitigate downstream and upstream GHG emissions was arbitrary and capricious because FERC is responsible for imposing mitigation measures that are still reasonably foreseeable even if they do not know the full extent of the effects. Courts have the authority to review FERC's ruling and overturn it when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Sierra Club*, 867 F.3d at 1378.

When FERC approves an application for pipeline construction, they consider "such modification and terms as the Commission may find necessary or appropriate." 15 U.S.C. § 717b(e)(1). The downstream and upstream GHG effects of the natural gas are this: the natural gas transported by the AFP will be burned, and its effects will be released one way or another into the atmosphere, so FERC has the authority to mitigate upstream and downstream effects of carbon pollution.

The upstream and downstream effects of even the eventual burning of natural gas are large and FERC has the authority to limit the pollution because it is harmful even when indirectaffi. *West Virginia Pub. Servs. Comm'n v. Dep't. of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982). FERC has not only the responsibility to mitigate direct effects but also "indirect effects" which are reasonably foreseeable but manifest later. *Sierra Club*, 867 F. 3d at 1371 (citing NEPA Review, 40 C.F.R. § 1508.8(b)).

In *EarthReports v. FERC*, the D.C. Circuit denied the petitioner's claim that the construction of a pipeline would have an indirect effect of increased exports on upstream natural gas production. *EarthReports v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016). The petitioners alleged

that the increased exportation of natural gas would result in more greenhouse gas emissions from the production, transmission, and consumption of the natural gas. *Id.* at 955. The court ruled in part that the "indirect effect similarly cannot occur unless a greater volume of [LNG] is shipped from [Cove Point] and enters the international market." *Id.* at 956.

Here, Transnational Gas plans to export 90% of the natural gas that is pumped through the pipeline. R. 2. In *EarthReports*, the pipeline was a dual use pipeline for both importation and exportation. International Oil will export 90% of the natural gas, R. 2, and is one that exports is of a "greater volume" that is carried through the pipeline to the international market, specifically to Brazil. R. at 2. Thus, the Commission should have extended the mitigating GHG conditions to cover the downstream and upstream effects of the pipeline and its exportation. FERC's determination to not include conditions mitigating the upstream and downstream effects of GHG emissions of the AFP project is arbitrary and capricious, because it is within their authority to mitigate when 90% of the natural gas transported through the pipeline will be transported.

Finally, like *Sierra Club* where the Florida gas plants were the end users of the gas, here the end users of the natural gas are easily identifiable because Transnational Gas has an existing contract with International Oil and New Union Gas to sell the full design capacity of the Project. R. 6. Thus, like the burning of natural gas in Florida that the D.C. Circuit in *Sierra Club* ruled FERC should have considered, FERC could have reasonably foreseen that the natural gas carried in the pipeline would be burned and cause more carbon pollution. Thus, for all the above reasons, FERC's decision to not include mitigations for upstream and downstream carbon emissions was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should grant HOME's request for a rehearing on the issues raised. FERC failed to demonstrate public need for the AFP, prove the AFP's location does not violate RFRA, and finally, exercise its authority to include downstream and upstream GHG emissions in the GHG conditions.